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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962.

No. 275

ESTATE OF FLOYD B. FAULKERSON, DECEASED,
BERNIECE E. FAULKERSON, ADMINISTRATRIX,
*Petitioner,*

*against*

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JEROME J. O'DOWD,
503 Fort Wayne Bank Building,
Fort Wayne, Indiana,
*Counsel for Petitioner,*

JEROME B. VAN ORMAN,
*Of Counsel.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit, affirming the decision and judgment of the United States District Court for the Northern District of Indiana, Fort Wayne Division, in favor of the defendant after trial.

### OPINIONS BELOW.

The opinion of the United States District Court for the Northern District of Indiana, Fort Wayne Division, a copy of which is printed in Appendix A, is reported at 193 F. Supp. 410. The opinion of the United States Court of

Appeals for the Seventh Circuit, a copy of which is printed in Appendix B, is reported at 301 F. 2d 231.

## JURISDICTION OF THIS COURT.

The judgment of the District Court was dated and entered March 29, 1961. The judgment of the Court of Appeals was dated and entered March 28, 1962. The order of the United States Court of Appeals for the Seventh Circuit, denying a petition for rehearing was dated and entered April 26, 1962.

The statutory provision conferring jurisdiction on this Court to review the judgment and decision in question is 28 U. S. C. A. 1254 (1).

## QUESTION PRESENTED.

Is a final state probate court decision determining property rights of parties, with the court having jurisdiction of the property and the parties, entitled to binding effect in a federal tax case on the precise subject which is at issue in the tax proceeding when the proceedings in the state court were nonadversary in the sense that the parties, having adverse property interests, with notice of the state court proceedings to determine property rights, did not appear to contest the determination?

## STATEMENT OF THE CASE.

Floyd B. Faulkerson died on December 27, 1954, and at the time of his death, was a resident of Steuben County, State of Indiana. Decedent died testate and the Will was probated in the Steuben County Circuit Court and a decree was entered awarding the entire estate to the widow. This decree was a final decree of the Steuben County Circuit Court and had never been appealed nor reopened. Berniece E. Faulkerson, surviving wife of Floyd B. Faulkerson,

decedent, was appointed Administratrix with the Will Annexed of the Estate of Floyd B. Faulkerson, Deceased. The Administratrix, when the federal estate tax was paid, claimed, as a marital deduction, one-half the value of the "adjusted gross estate." This claim was disallowed by the defendant through its Commissioner of Internal Revenue and a deficiency was assessed and paid by the Administratrix in the amount of $22,972.44. The Administratrix sought a refund of this amount plus interest after her claim for refund had been rejected by the Commissioner.

By the provisions of decedent's Will, the widow was to have the use, income, rents and profits of the entire estate for and during her life. Subject to the widow's interest, all the rest and residue of the decedent's estate after the death of the widow was devised and bequeathed to the Lincoln National Bank and Trust Company of Fort Wayne, Indiana, to be held in trust by it for the use and benefit of Robert and Elizabeth Faulkerson, their children, until they shall attain the age of thirty-five years. The final clause of the Will gave all the rest, residue and remainder of the estate to the widow. On the date of death of decedent, his wife, Berniece E. Faulkerson, was living and their two children, Robert and Elizabeth Faulkerson, were each thirty-nine years of age. Decedent's children, Robert and Elizabeth Faulkerson, had notice of the proceedings before the Steuben County Circuit Court upon the Administratrix' petition to allow distribution of the entire net estate to the widow, Berniece E. Faulkerson, but neither child appeared in said proceeding to contest said proposed distribution, nor offered any objection to this proposed distribution.

## JURISDICTION OF THE COURT OF FIRST INSTANCE.

The jurisdiction of the court of first instance lies under 28 U. S. C. A. Section 1346 (a) (1). This suit was commenced by the plaintiff, a resident of Angola in the State of Indiana, against the defendant United States of America, for refund of federal estate taxes erroneously assessed and wrongfully collected under the Internal Revenue Laws of the United States, after demand for refund was refused by the Commissioner of Internal Revenue.

## ARGUMENT

The opinion of the United States District Court for the Northern District of Indiana stated in discussing the binding effect on it of the decree of the Steuben County Probate Court that there is a definite split of authority among the Circuit Courts of Appeals on this point (Appendix A). This judgment of the district court was later affirmed by the United States Court of Appeals for the Seventh Circuit (Appendix B). The opinion of the district court further stated that support for the petitioner's position is found in the 1st, 3rd, and 6th Circuits. The district court in its opinion stated that the case of *Gallagher* v. *Smith*, 223 F. 2d 218 (3rd Circuit, 1955) supported petitioner's position. The said case held that state court decisions determining property rights of parties, which were not obtained by collusion for the purpose of defeating tax liability, are entitled to binding effect in federal tax cases even though the proceedings were nonadversary in the sense that there was no litigation in the state court action. Therefore, there is present a finding by the district court in the case at bar that there was no collusion for the purpose of defeating tax liability. The district court held that an adversary proceeding is an essential requirement for conclusiveness of a state court judgment. With this interpretation the United States Court of Appeals for the Seventh Circuit agreed by its affirmance of the judgment. However, in its opinion the Court of Appeals further states that the state court decree in the case at bar was obtained in a proceeding that was collusive in the sense that a decision was sought which would adversely affect the Government's right to additional estate tax. This statement is merely gratuitous and not relevant to any determination

by the Court, since it based its affirmance of the judgment on the fact that the state court decree was entered in an undefended and nonadversary proceeding and was not binding on the federal court. Both the district court and the Court of Appeals in the case at bar relied on the case of *Brainard* v. *Commissioner of Internal Revenue*, 91 F. 2d 880 (7th Circuit, 1937) as determinative of the question involved. The opinions of both the district court and the Court of Appeals in this case certainly support the proposition that an adversary proceeding in the state court is essential in order for the state court decree to be binding in federal tax litigation. Since the United States Court of Appeals for the Seventh Circuit, by its affirmance of the district court's judgment that an adversary proceeding was essential in the case at bar for conclusiveness of the state court decree, has rendered a decision in conflict with the decision of the United States Court of Appeals for the Third Circuit on the same matter as set forth in the case of *Gallagher* v. *Smith*, 223 F. 2d 218, a review on writ of certiorari is here most respectfully sought.

The opinion of the Court of Appeals stated that the decree of the Steuben Circuit Court was rendered in an *ex parte*, nonadversary proceeding, without a hearing on the merits. The decree that the plaintiff relied upon in this matter was the decree of final distribution and not any intermediate decree. This final decree was not *ex parte*, because it was entered pursuant to notice which fact the record clearly shows (Appellant's Appdx., p. 17). The proceeding may not have been involved with adversary parties in the sense that the case was litigated and contested in the Steuben Circuit Court but there were certainly adversary parties and proceedings involved in the sense of the property interests of the parties being affected. To say that the decree was rendered without a hearing on the merits is to give effect to form and not to substance.

One of the basic tenets of "a passing on the merits" is that the subject matter at issue in the state court proceeding must be, in whole or in part, that which is at issue in the tax proceeding. Mertens Law of Federal Gift and Estate Taxation, Vol. 1, Sec. 10.14, p. 641. The Steuben Circuit Court did have jurisdiction over the parties and subject matter. The state court final decree was final and conclusive under state law on the parties as to the nature and extent of the property rights which were the subject matter of the proceeding. There was an adjudication here by the state court of property matters and a Will construction in a probate proceeding which was instituted solely for that purpose. The subject matter at issue in the state court proceeding was the same that was at issue in the tax proceedings; namely, what the nature was of the interest in the property which passed from the decedent to his surviving spouse by bequest or devise.

The opinion of the Court of Appeals overlooks the nature of the state court probate proceeding. A probate proceeding is one *in rem* and if the statutory provisions regarding constructive service and notice are observed it is binding upon all persons in the world. *In re Broderick's Will*, 21 Wall. 503, 88 U. S. 503, 509, 519, 22 L. E. 599; Burns Indiana Statutes, Annotated, Sec. 7-102.

The opinion of the Court of Appeals stated that the decree was obtained in a proceeding that was collusive in the sense that a decision was sought which would adversely affect the Government's right to additional estate tax. This may be a valid statement in a nonadversary proceeding when no real issue of property rights is involved or when no real issue existing independently of a tax problem is involved, where it can be said that the proceedings might be considered collusive in that the litigation was prompted pre-eminently by tax purposes. However, the property rights of all the parties were involved in the

case at bar and the fact of a nonadversary proceeding in the sense of no litigation occurring should not be determinative in this situation that collusion in the tax sense was present.

Although the effect of nonadversity cannot be regarded as yet as free from controversy, an analysis of the cases supports a statement of the rule which treats the consent nature of a decree, or the nonadversary character of the proceeding, or the resulting lack of any extended consideration of the merits as factors which are relevant in the determination of whether there was a "passing on the merits" but not as in and of themselves determinative of the acceptability of the state court decision.

There is a "passing on the merits" if the subject matter at issue in the state court proceeding is that which is at issue in the tax proceeding and it involves a real issue of property rights.

The decision below departed so far from the accepted and usual course of judicial proceedings of a court as to call for a review of the decision when it refused to consider the record evidence that the decree was not rendered in an *ex parte* proceeding, when it added in its opinion that the decree was collusive in the tax sense from the fact of a nonadversary proceeding alone, and when it added in its opinion that the decree was rendered without a hearing on the merits when the subject matter at issue in the state court proceeding was that which was at issue in the tax proceeding and it involved a real issue of property rights. These matters were specifically called to the court's attention in the Petition for Rehearing.

## CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Dated: July 23, 1962.

Respectfully submitted,

JEROME J. O'DOWD,
*Counsel for Petitioner,*
503 Fort Wayne Bank Building,
Fort Wayne, Indiana.

JEROME B. VAN ORMAN,
*Of Counsel.*

# APPENDIX A.

IN THE UNITED STATES DISTRICT COURT.

(Caption—1183)

## ORDER.

This is a suit to recover Estate taxes paid on behalf of the Estate of Floyd B. Faulkerson in the amount of $22,972.44.

The facts, briefly stated, are as follows:

Floyd B. Faulkerson died testate on December 27, 1954. By the provisions of his Will, his wife was to have the use, income, rents and profits of the entire estate for and during her life and upon her death, Robert and Elizabeth Faulkerson, their son and daughter, respectively, were to take the remainder interest, subject to a trust that was to terminate upon their attaining the age of 35 years. The final clause of the Will gave all the rest, residue and remainder of the estate to decedent's wife.

This Will was probated in the Steuben County Circuit Court and a decree was entered awarding the entire estate to the widow.

When the Estate tax was paid the Administratrix claimed, as a marital deduction, one-half the value of the "adjusted gross estate." This claim was disallowed by the Commissioner of Internal Revenue and a deficiency was assessed and paid in the amount of $22,972.44. In this action plaintiff seeks a refund of this amount, plus interest.

It is the contention of the plaintiff that the decree of the Steuben Circuit Court is binding on this Court and

has conclusively determined the right of the plaintiff to the marital deduction. There is a definite split of authority among the Circuits on this point.

Support for the plaintiff's position is found in *Gallagher* v. *Smith*, 223 F. 2d 218 (3rd Circuit, 1955); *Plunkett* v. *Commissioner of Internal Revenue*, 118 F. 2d 644, (1st Circuit, 1941), and *Nashville Trust Co.* v. *Commissioner of Internal Revenue*, 136 F. 2d 148 (6th Circuit, 1943).

Authority contra can be found in *Estate of Stallworth* v. *Commissioner of Internal Revenue*, 260 F. 2d 760 (5th Circuit, 1958); *Estate of Sweet* v. *Commissioner of Internal Revenue*, 234 F. 2d 401 (10th Circuit, 1956); *Pitts* v. *Hamrick*, 228 F. 2d 486 (4th Circuit, 1955); *Doll* v. *Commissioner of Internal Revenue*, 149 F. 2d 239 (8th Circuit, 1945); *Wolfsen* v. *Smyth*, 223 F. 2d 111 (9th Circuit, 1955) and *Daine* v. *Commissioner of Internal Revenue*, 168 F. 2d 449 (2nd Circuit, 1948).

A brief reference to the holding in certain of the above decisions would appear to be in order here.

In *Gallagher* v. *Smith*, *supra*, which appears to be the main case relied upon by the plaintiff, the Court qualifies the holding by stating that the State court judgment must "* * * not (be) obtained by collusion for the purpose of defeating the tax."

In the case of *Stallworth's Estate* v. *Commissioner of Internal Revenue*, *supra*, it is stated, "If the Alabama suit was non-adversary in character it is not binding," on the Federal Court.

*Estate of Sweet*, *supra*, held:

> "While rights and interests of parties in property are created and determined by state law, an order or judgment of a state court obtained through collusion, or attended with some other badge of fraud, or entered in a nonadversary proceeding, is not binding as between one or more parties to such proceeding and

the United States in respect to income or estate taxes imposed by federal legislation."

In the *Daine* case, *supra*, the court held "* * * it is clear that the retroactive judgments of state courts do not determine the rights of the Federal Government under its tax laws."

The only Circuit that has not been cited above on this question appears to be the Seventh.

Defendant refers us to *Merchants National Bank & Trust Company of Indianapolis v. United States*, 246 F. 2d 410 (7th Circuit, 1957), as a case wherein our Circuit held such a state court decree not binding. Our interpretation of this case does not agree with defendant's. The parties in the *Merchants National Bank* case had agreed that if the state court decision had been rendered in a non-adversary proceeding it would not be binding. The 7th Circuit Court of Appeals merely determined that the state court proceeding was nonadversary. They never passed on the question present here.

> "* * * both sides agree that, if the probate court final decree was entered by consent of the parties or in a nonadversary proceeding, it is not binding upon defendants in this federal estate tax litigation. It is, therefore, unnecessary for us to pass upon the validity of that proposition of law and we are relieved of any obligation to consider and reconcile a number of seemingly conflicting federal courts of appeals cases." *Merchants National Bank and Trust Company of Indianapolis v. United States*, *supra*, at page 417.

Through independent research, however, this Court discovered a 7th Circuit case that would seem to be in point. In *Brainard v. Commissioner of Internal Revenue*, 91 F. 2d 880, (7th Circuit, 1937), the plaintiff presented a duly authenticated decree of the Cook County Circuit Court and argued that this decree was conclusively determinative of the issue before the federal court.

The 7th Circuit, speaking through Justice Sparks, said,

> "With due deference to that court, however, we cannot accept the ruling as an expression of the judgment of the state of Illinois as to the property rights of her citizens in the interpretation of the local laws. That court's jurisdiction is limited to Cook County and there are close to a hundred other circuit courts in Illinois of equal jurisdiction which are not bound by the rulings of the Cook County Circuit Court. For the interpretation of the laws of Illinois, we must look to the decisions of the Supreme and Appellate Courts of that state, for their rulings are binding upon all the inferior courts of Illinois.
>
> It is no doubt true that the proffered decree is binding upon the parties to that suit, and it will not be appealed from, because all parties thereto are satisfied with it; but we think it cannot be binding on the government, which was not a party, and which of course has no right of appeal."

*Brainard* v. *Commissioner of Internal Revenue*, *supra*, at pages 883-884.

It is the opinion of this Court that the *Brainard* case and the cases cited above from the 2nd, 4th, 5th, 8th, 9th and 10th Circuits represent the better view, and, accordingly, we hold that the decree of the Steuben Circuit Court is not binding.

The above holding presents us with another issue. If the beneficiary of a testamentary trust that is to arise after a life estate in another attains the age at which he is to take the corpus before the trust comes into existence, due to the longevity of the intervening life tenant, does the trust lapse for want of a beneficiary and the property pass with the residue to the residuary legatee?

It is the plaintiff's contention that it does. As authority for this proposition, plaintiff cites *Hancock Trustee* v. *Maynard*, 72 Ind. App. 661, 126 N. E. 451, (1920); *Levering*

v. *Levering*, 88 Ind. App. 374, 162 N. E. 448, (1928); *Trustees of Presbyterian Church* v. *Katsianis*, 78 Ind. App. 406, 134 N. E. 684, (1922); *Shriver* v. *Montgomery*, 181 Ind. 108, 103 N. E. 945, (1914); *Fisher* v. *Harrison* (Va. 1935), 182 S. E. 543, 104 A. L. R. 102; *French* v. *Heywood*, (Mass. 1913), 102 N. E. 271 and *Carey* v. *White*, 126 Ind. App. 418, 126 N. E. 2d 255, (1955).

None of these cases are in point. In each of them, with the exception of *Fisher* v. *Harrison*, *supra*, the gift in trust was held to have lapsed *because of the death of the beneficiary*. That is not the case here. In *Fisher* v. *Harrison*, *supra*, the gift in trust lapsed due to the ambiguity and uncertainty of the language used and for this reason it is not in point either.

In the instant case the children had merely attained the age at which they were to take the corpus of the trust. This does not cause the trust to lapse for want of a beneficiary. At most it makes the trust "passive" or "dry," since all of the active duties of the trustees have been performed, i. e., the property withheld until the beneficiaries reached the age of 35. See *Jackson* v. *Pillsbury*, (Ill.) 44 N. E. 2d 537, (1942). No Indiana authority directly in point has been found but Indiana does recognize this principle of law. See Indiana Law Encyclopedia, Volume 28, Trusts, § 98, p. 564-65; Burns' Indiana Statutes Annotated 56-609, and *Allen* v. *Craft*, 109 Ind. 476, 9 N. E. 919, (1887).

It is clear to this court that the Will of Floyd B. Faulkerson, which was drawn on April 6, 1931, intended to create an active trust of his estate for the benefit of his two children until they should attain the age of 35 years. It is equally clear that it was the intent of Mr. Faulkerson to give only a life estate to his wife. The fact that the children attained the age of 35 years prior to testator's death in no way changed his intentions. The result of

this fact is merely to change the trust for the benefit of the children to a "passive" trust. Upon the eventual demise of his widow the property passes to the trustee for an instant only and then on to the beneficiaries. *Allen* v. *Craft, supra.*

This Court holds that the Estate of Floyd B. Faulkerson was not entitled to the marital deduction it claimed and that the Commissioner was correct when he disallowed this deduction and assessed the deficiency.

It is therefore, the considered judgment of this Court that the law is with the defendant and against the plaintiff, that plaintiff take nothing by way of his Complaint and that plaintiff bear the costs of this action.

Robert A. Grant,
*Judge.*

Enter: March 29, 1961.

## APPENDIX B.

IN THE UNITED STATES COURT OF APPEALS.
For the Seventh Circuit.
September Term, 1961—January Session, 1962.

No. 13519
ESTATE OF FLOYD B. FAULKERSON, Deceased, BERNIECE E. FAULKERSON, Administratrix, *Plaintiff-Appellant*, *vs.* UNITED STATES OF AMERICA, *Defendant-Appellee*.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.

March 28, 1962

Before HASTINGS, *Chief Judge*, SCHNACKENBERG and KILEY, *Circuit Judges*.

HASTINGS, *Chief Judge*. Plaintiff-taxpayer, Berniece E. Faulkerson, administratrix with the will annexed of the estate of Floyd B. Faulkerson, deceased, brought this action in the district court against United States of America to recover federal estate taxes paid on her decedent's estate. Following a trial by the court, on a stipulation of facts, judgment was entered denying such refund. This appeal followed.

The errors relied on for reversal arise out of the ruling by the district court that the law it with the Government.

The facts are undisputed and may be summarized as follows:

The testator, Floyd (B.) Faulkerson, executed his will on April 6, 1931. He died testate a resident of Steuben County, Indiana on December 27, 1954. He left surviving his widow, Berniece E. Faulkerson and two children, Robert and Elizabeth, each 39 years of age at the time of his death. His widow probated the will in the Steuben Circuit Court (Indiana) and qualified as administratrix with the will annexed of his estate on February 8, 1955.

By the terms of the will, his wife was to receive a life estate in the entire estate with power to sell assets "for the purpose only of preventing loss and depreciation therein and for reinvestment;" upon her death the two children were to take the remainder interest, subject to a trust that was to terminate upon their attaining the age of 35 years. A final clause in the will left "all the rest, residue and remainder" of the estate to the wife.

On August 19, 1955, the administratrix petitioned the Steuben Circuit Court for entry of a decree that she be declared to be "the sole beneficiary under the will" of decedent and that all securities held by her in her fiduciary capacity be transferred to her individually as the widow. On the same day, the court entered such a decree. This decree was entered in an *ex parte* proceeding without notice to anyone, without appearances and without a hearing on the merits. The petition itself gives no reasons in support of the decree requested and makes *no reference* to the provisions of the will, other than to say that she is the beneficiary named in the will.

On October 20, 1955, taxpayer executed the federal estate tax return and claimed as a marital deduction one-half the value of the adjusted gross estate. This claim was subsequently disallowed by the Commissioner of Internal Revenue and a deficiency was assessed and paid in the amount of $22,972.44. In this action, taxpayer seeks a refund of this amount, with interest.

Other proceedings had in the Steuben Circuit Court were the Indiana state inheritance determination, payment of such tax and the approval of a final accounting and distribution of the assets of the estate. The actions taken were consistent with the prior decree of such court finding the widow to be the sole beneficiary under the will. These other proceedings were *ex parte* in nature, without any personal notices to or appearances by testator's two children.

In the instant case, the district court held that it was not bound by the decree of the Indiana state court determining the widow to be the sole beneficiary. It held in effect that the widow took only a life estate with the remainder in fee to the two children. As a consequence, it was determined that decedent's estate was not entitled to the claimed marital deduction and that the Commissioner was correct in his disallowance of such deduction and in assessing the deficiency. We agree with these findings and the judgment entered thereon.

We have no quarrel with the holdings in numerous Indiana decisions cited by taxpayer governing the construction of wills. Likewise, we entertain no doubt that the district court correctly determined the beneficial interests of the widow and the two children under the will in question. At the time of testator's death, the children were beyond the age fixed in the testamentary trust, and they took as *remaindermen, subject only to the life estate* in their mother, the widow.

Taxpayer contends that in any event the decree of the Steuben Circuit Court is binding on the federal court and that such decree has conclusively determined the right of taxpayer to claim the marital deduction. We do not agree.

The decree of the Steuben Circuit Court was rendered

in an *ex parte*, nonadversary proceeding, without a hearing on the merits. It reached a result contrary to Indiana law and Treasury Regulations. The decree was obtained in a proceeding that was collusive in the sense that a decision was sought which would adversely affect the Government's right to additional estate tax. The Steuben Circuit Court is one of approximately 84 such courts of equal jurisdiction in Indiana whose decisions are not binding on each other. Under all these circumstances, we hold that the district court was not bound by such decree. *Blair* v. *Commissioner*, 300 U.S. 5, 9-10 (1937); *Stallworth's Estate* v. *Commissioner of Internal Rev.*, 5 Cir., 260 F. 2d 760, 763 (1958); *In re Sweet's Estate*, 10 Cir., 234 F. 2d 401, 404 (1956), cert. denied, 352 U.S. 878; *Wolfsen* v. *Smyth*, 9 Cir., 223 F. 2d 111, 113-114 (1955); *Newman* v. *Commissioner of Internal Revenue*, 9 Cir., 222 F. 2d 131, 136 (1955); *Brainard* v. *Commissioner of Internal Revenue*, 7 Cir., 91 F. 2d 880, 883-84 (1937), appeal dismissed, 303 U. S. 665; Treasury Regulations on Estate Tax, 1954 Code, Section 20.2056(e)-2(d)(2).

On the question of the binding effect of the state court decree, we find a somewhat analogous situation in *Brainard* where we considered the construction of a trust by an Illinois circuit court as it related to the imposition of federal income taxes. In that case, 91 F. 2d at 883-84, we said:

> "Appellant, however, has presented to us a duly authenticated decree of the circuit court of Cook county, Illinois, in a case wherein this appellant filed his complaint in chancery, against his wife and mother, for the construction of this trust with respect to the question now before us. That court differs with us as to the construction and effect of appellant's declaration of trust, and his subsequent acts with respect thereto. With due deference to that court, however, we can not accept the ruling as an expression

> of the judgment of the state of Illinois as to the property rights of her citizens in the interpretation of the local laws. That court's jurisdiction is limited to Cook county, and there are close to a hundred other circuit courts in Illinois of equal jurisdiction which are not bound by the rulings of the Cook county circuit court. For the interpretation of the laws of Illinois, we must look to the decisions of the Supreme and Appellate Courts of that state, for their rulings are binding upon all the inferior courts of Illinois.
>
> "It is no doubt true that the proffered decree is binding upon the parties to that suit, and it will not be appealed from, because all parties thereto are satisfied with it; but we think it can not be binding on the government, which was not a party, and which of course has no right of appeal."

In a recent decision, concerning the assessment of a federal estate tax deficiency, we passed on the character of a state court proceeding in which a decree was entered. On a statement of facts far more favorable to taxpayer than in the case at bar, we found that the decree was entered in an undefended and nonadversary proceeding and was not binding on the federal court. It is interesting to note that the parties had *agreed* that "if the probate court final decree was entered by consent of the parties or in a nonadversary proceeding, it is not binding upon [United States] in this federal estate tax litigation." *Merchants National Bank & Trust Co.* v. *United States*, 7 Cir., 246 F. 2d 410, 417 (1957), cert. denied, 355 U. S. 881.

We do not say that in a proper case—where the state court proceeding was adversary and not *ex parte;* where a hearing was had on the merits; where the question of law has been settled by the appellate courts of the state or where the judgment of an intermediate court may be fairly accepted as evidencing the law of the state; and where the judgment is not collusive—a federal court

should not be bound by the determination of property rights in the state courts. See *Morgan* v. *Commissioner*, 309 U.S. 78 (1940); *Helvering* v. *Bullard*, 303 U.S. 297 (1938); *Blair* v. *Commissioner*, 300 U.S. 5 (1937); *Freuler* v. *Helvering*, 291 U.S. 35 (1934); *Duling* v. *Markan*, 7 Cir., 231 F. 2d 833 (1956), cert. denied, 352 U.S. 870; *Pitts* v. *Hamrick*, 4 Cir., 228 F. 2d 486 (1955); *Gallagher* v. *Smith*, 3 Cir., 223 F. 2d 218 (1955).

Decedent executed his will in 1931 and died in 1954. In 1948, the Congress first created the marital deduction to be used in computing the net estate for federal estate tax purposes. As is often the case, this testator did not revise his will to enable his estate to gain the tax advantage given by the marital deduction.

In sum, we conclude that the district court properly construed testator's will under Indiana law, properly refused to be bound by the decree of the Steuben Circuit Court and properly held that decedent's estate was not entitled to the marital deduction for federal estate tax purposes.

The judgment of the district court is affirmed.

AFFIRMED.